

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.

Debtors

CASE NO. 96-61376

Chapter 11

Substantively Consolidated

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court considers herein the Fifth Interim Fee Application (“Fifth Application”) of Simpson, Thacher & Bartlett (“STB”), attorneys for Richard C. Breeden as trustee in the consolidated case (“Trustee”). The Fifth Application seeks payment of professional fees in the amount of \$3,046,312.50 and reimbursement of expenses in the amount of \$430,599.76 incurred during the period July 1, 1997 through October 31, 1997.¹ This Fifth Application was submitted to Stuart, Maue, Mitchell and James, Ltd. (“Fee Auditor”) in accordance with the Court’s Amended Order dated December 2, 1996, regarding Fee Applications subject to review by the Fee Auditor (“Amended Order”).² The report of the Fee Auditor (“Auditor’s Report”) was filed with the Court on March 20, 1998. Originally scheduled for April 9, 1998, the Fifth Application came on for a hearing before the Court on April 23, 1998, and was adjourned to May 21, 1998, at which time the Court approved a provisional award of \$1,000,000 in fees and \$200,000 in expenses to STB. Opposition to the Fifth Application was interposed by the United States

¹STB adjusted its fee and expense request as reflected on Exhibit A attached to its Response to Fee Auditors Review and Analysis of Fifth Interim Fee Application filed April 3, 1998 (STB’s “Response”). The net adjusted fee is \$3,044,481.50 and the adjusted expense total is \$430,466.25.

² Pursuant to the Amended Order, STB was to have ten calendar days after the Auditor’s Report was filed to respond to it. In the Fifth Application STB requests that it be allowed fourteen calendar days. *See* STB’s Response at footnote 4. On or about September 21, 1998, by way of a formal motion, STB requested that ¶ 5 of the Amended Order be revised to allow it fifteen calendar days to respond. The Court granted the relief in an order dated October 14, 1998.

Trustee (“UST”) and the Official Committee of Unsecured Creditors (“Committee”).

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over this contested matter pursuant to 28 U.S.C. §§ 1334(b) and 157(a), (b)(1) and (b)(2)(A) and (O).

FACTS AND ARGUMENTS

Familiarity with the prior decisions of this Court which dealt with the first four fee applications of STB is presumed and they will be referenced herein to the extent necessary.³

The Auditor’s Report generally identifies entries in STB’s time records offered in support of the Fifth Application as falling into twenty general categories which “Appear to Violate Court Guidelines.” In addition, the Auditor’s Report isolates approximately one hundred fourteen much more specific and limited categories or tasks which it calls to the Court’s attention for review and analysis.

STB provided specific replies to the Auditor’s Report in its Response filed April 3, 1998. In that Response STB indicates that it has voluntarily reduced the Fifth Application by the net sum of \$1,831.50 which the Auditor’s Report indicated was the result of duplicate billing errors.

³ The Court entered Memorandum-Decisions, Findings of Facts, Conclusions of Law and Order dated February 5, 1997, August 13, 1997, March 20, 1998 and August 6, 1998. STB moved to reconsider the Order of August 13, 1997 and on February 9, 1998, the Court entered a Memorandum-Decision, Finding of Fact, Conclusion of Law and Order reconsidering that Order. Familiarity with that Memorandum-Decision is also presumed.

STB has also conceded that its expenses should be reduced by \$133.51.

STB once again challenges the Auditor's Report insofar as it questions "Vaguely Described Tasks," "Multiple Attendance at Events" and "Claimed Administrative and Clerical Tasks" making many of the same observations that it has made previously in criticizing the Auditor's Reports relating to its First, Second, Third and Fourth Fee Applications. Those criticisms need not be reiterated a fifth time in this decision.

With regard to the one hundred fourteen more specific categories identified by the Fee Auditor which "The Court May Wish to Examine for Relevance Necessity and Reasonableness," STB again focuses its Reply on the Fee Auditor's highlighting of members of the firm who billed less than 20 hours during the current reporting period and those who recorded more than 12 hours in any one day during the same period. Concerning the latter observation highlighting 12 hour plus days, the Court in its prior fee decision allowed fees for those services in recognition of the preparation that preceded each of the so-called "§ 362(d) trials" which, with the exception of the "Carmi hearing," were completed in May of 1997. The Court will disallow 50% of the \$86,556 or \$43,278 identified in this category pending further explanation by STB concerning the necessity for these extended hours by what appear to be largely for services rendered by individuals other than attorneys.

The Court does once again focus on STB's time devoted to "Vaguely Described Tasks," "Multiple Attendance at Events," "Intra Office Conferences," and "Administrative and Clerical Tasks". Having written four prior decisions dealing with each of the foregoing categories, the Court will not reiterate the basis for its adjustments except as set forth below.

Vaguely Described Tasks

Subdivided into two categories: Conferences and Other. Upon an analysis of STB's time records as isolated by the Fee Auditor on its Exhibits C and D, as well as STB's Response, the Court makes the following adjustments:

Fee Auditor's Exhibit C - disallow \$445.50

Fee Auditor's Exhibit D - disallow \$229.00

Total disallowance	\$674.50
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Multiple Attendance at Events

As reflected on Fee Auditor's Exhibit E - disallow \$4,855.50

Intra Office Conferences

As reflected on Fee Auditor's Exhibit P-1 - disallow \$7,599

Administrative and Clerical Tasks

As reflected on Fee Auditor's Exhibits F-1, F-2, F-6 and G-2, specifically Exhibits F-1, Filing/Organizing/Retrieving ; F-2, Distribution of Documents/Materials; F-6 Miscellaneous Clerical Tasks and G-2, Assist in Service of Documents, combined disallowance, \$80,101. This disallowance represents one-third of the total fees reflected on Fee Auditor's Exhibits F-1, 2, 6 and G-2.

Fee Application - (As reflected on Fee Auditor's Exhibits DD-1 through DD-3.)

In its February 9, 1998 Memorandum-Decision, Findings of Fact, Conclusions of Law and Order, the Court indicated that it would limit STB's fees in connection with the preparation and defense of fee applications to 3% of the total fees billed for the interim period for services

related to the preparation and defense of fee applications (“3% rule”). The Fifth Application seeks total fees of \$42,991 in connection with preparation and defense of its fee applications. The Court disallows \$41,701.27

Retention of Local Counsel

According to Exhibit DD-8 of the Auditor’s Report, STB seeks \$16,449 in connection with what is identified by the Fee Auditor as “Retention of Local Counsel.” The Court will disallow \$16,449 in connection with these services, subject to further information being provided by STB indicating the need and benefit to the Estate of these services in such a significant dollar amount..

Lady Kathleen

The Court will once again disallow a fee of \$4,228 which is attributable to services rendered in connection with the yacht referred to as the Lady Kathleen which the Court has previously concluded was not an asset of the consolidated estate. (Fee Auditor’s Exhibit U-10).

Change of Venue of Michael A. Bennett Case

Following a hearing on June 12, 1997, on the application of the Trustee, the firm of Coll Davidson Carter Smith Salter & Barkett, P.A. (“Coll”) was retained as special counsel in connection with “any bankruptcy case commenced. or that may be commenced in south Florida by Edmund T. Bennett, Kathleen Bennett and/or Michael A. Bennett . . .” pursuant to an order dated June 17, 1997. On August 4, 1997, Michael A. Bennett (“M. Bennett”) filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code with the Clerk of the U.S. Bankruptcy

Court for the Southern District of Florida. According to Coll's first fee application filed with this Court on July 2, 1998, the firm's services in connection with the M. Bennett case began on or about August 8, 1997, with a telephone conference with a member of STB. On August 13, 1997, STB filed a motion in this Court on behalf of the Trustee seeking an order transferring the pending chapter 7 case to the Northern District of New York. The Trustee's motion was denied by the Court on September 5, 1997, on the finding that M. Bennett was not an affiliate of two of the Debtors herein, namely The Processing Center ("TPC") and Aloha Capital Corporation ("ACC"), at the time he filed his chapter 7 petition in Florida. M. Bennett had transferred his ownership in both corporations to the Estate on May 8, 1996 and May 15, 1997, respectively. The Trustee cited no cases in support of the relief sought and the Court found none to alter its conclusion that the motion was more appropriately brought in the bankruptcy court in Florida.

The Court has reviewed the time records submitted by STB in connection with the change of venue motion. Between August 8, 1997, and September 5, 1997, the Trustee incurred fees of approximately \$20,830.50. Having employed special counsel to handle the matters in connection with M. Bennett's chapter 7 in Florida, the Court is of the opinion that the services performed in connection with the Trustee's motion were of limited benefit to the Estate. Accordingly, the Court will disallow 30% of these fees incurred in this regard or \$6,249.15.

Database Matters

In its review of STB's fee application, the Court notes that the Estate is being asked to pay for services rendered in connection with various database matters. For example, on September 12, 1997, there is an entry for Maurice Hartigan for 1.2 hours/\$360 to "prepare

materials for database session.” There is also listed 25.6 hours of what appear, for the most part, to be database services rendered by Moshe Azouli in connection with, *inter alia*, case administration and general fraud investigation at a total cost to the Estate of \$3,072. Mr. Azouli billed 19.8 hours/\$2,376, between March 18, 1997 and June 30, 1997, for various computer-related functions and a “tape transcription project.” While the fees for those services were allowed in connection with STB’s Fourth Application, the Court has concerns about the increase in the hours attributable to database matters. The Fee Auditor points out in its Report that in addition to Mr. Azouli’s services, Alex Fan, who had not previously billed in this matter, billed 17.5 hours during the period now under review for various database-related tasks at a cost to the Estate of \$1,837.50, as identified in the Fifth Application.

The Court will disallow \$4,909.50 in connection with these services, subject to further information being provided by STB indicating the benefit to the Estate of these services and an indication as to why they should not be considered as part of STB’s overhead.

Days Inn Foreclosure

On or about December 2, 1996, the law firm of Harvey and Harvey, Harvey & Mumford was appointed special counsel to the Trustee in connection with a foreclosure action on the Days Inn Hotel, located in Syracuse, New York. According to the Fee Auditor, 4 hours of services were rendered by STB at a cost to the Estate of \$1,272.50. The Court has reviewed the services performed by STB, which included telephone conferences and the review of a proposed stipulation of settlement with IRR Assets. The Court finds the services reasonable and finds no basis for any disallowance.

Depositions and Interviews

Both the UST and the Committee express concerns regarding the \$456,810 in fees which were incurred in connection with numerous depositions and interviews conducted during the period from July 1, 1997 - October 31, 1997. In STB's Fourth Application, \$428,527.50 in fees were allowed in this regard. While the Court made no disallowance for them then and will not make any in connection with the Fifth Application, the Court emphasizes that any fee awarded in this regard is subject to being adjusted in the future if determined to be warranted.

Services rendered in Connection with § 341 Meetings

According to Exhibit FF-3, 32.4 hours were spent in connection with the meeting of creditors in Patrick Bennett's bankruptcy case. Fees totaling \$12,439 were incurred by two partners and six associates. The Court will disallow \$4,828 and will allow fees of \$7,611 with respect to the services rendered by one partner, George Newcombe, and one associate, Eric Kobrick.

A total of 13.5 hours were spent in connection with the meeting of creditors in Michael Bennett's bankruptcy case. Services totaling \$5,286 were rendered by four associates and two partners. *See* Exhibit FF-4. The Court will disallow \$1,802 and will allow fees of \$3,484 with respect to the services rendered by George Newcombe and one associate, Maurice Hartigan.

Miscellaneous Services

Between July 8, 1997, and July 9, 1997, STB charged the Estate for time spent in connection with interviewing potential part-time attorneys to assist with a "document project."

Eric Kobrick billed the Estate 2.5 hours/\$837.50 and Maurice Hartigan billed 1.8 hours/\$504, for these services. The Court will disallow \$1,341.50 on the basis that the Estate should not be charged for STB's recruitment efforts.

On October 29, 1998, the Estate was billed \$1,288 in connection with what is described as services rendered in "explaining the Trustee's position to the SEC." It is evident that there is overlap between the fraud investigations being conducted by the Trustee and those being conducted by the SEC with respect to the operations of the Debtors prior to March 29, 1996. The Court finds that these fees should be disallowed. In making that finding, the Court is by no means indicating that cooperation with the SEC is of no benefit to the Estate. Indeed, it has made no disallowance with respect to meeting held on October 27, 1997, between members of STB and the SEC for which the Estate was billed \$5,849. The Court merely wishes to caution STB that in order to be reimbursed from the Estate the services must be for the benefit of the creditors, not the SEC.

The Court notes that once again both the Creditors Committee and the UST, in other opposition to the Fifth Application, have expressed concerns about STB's alleged representation of two non-debtors, Equivest Finance Inc. and Resort Funding Inc. ("RFI"). Similar arguments were made in connection with the Fourth Application. In its Supplemental Statement of Position, filed on behalf of the Committee on May 18, 1998, the Committee expresses its belief that "with the exception of the expense which has been generated related to the conflict/disinterestedness issues, the Estate has not been damaged in any manner by the dual representation of the Estate and Equivest/RFI by STB. *See* Committee's Supplemental Statement at ¶ 9. On June 25, 1998, this Court entered an Order on motion of the Creditors Committee, and with the UST's consent,

to postpone for at least sixty days the conflict issues which necessarily implicate potential denial and/or disgorgement of professional fees some of which are presumably being awarded herein. To date the UST has not chosen to formally bring the matter before the Court by way of a motion. The fee and expense award made herein, as well as by virtue of the Court's Order awarding fees provisionally on the Fifth Application, are without prejudice to the rights of either the UST, the Creditors Committee or any other party in interest seeking disgorgement of said fees and expenses at some later point in time based on alleged conflicts of interest.

With regard to the remaining objections asserted by the UST and the Creditors Committee, the Court has fully considered the same in light of STB's Response to the objections of the UST and the Creditors Committee and has determined to make no further adjustments to the Fifth Application based upon those objections.

Expenses

The Fee Auditor has identified \$4,030.77 in travel expenses for which STB initially provided no receipts. On April 2, 1997, STB provided the Court with additional receipts which it indicated had previously been provided totaling \$225.77. STB also pointed out that \$3,805 which the Fee Auditor indicated was not supported by receipts actually had not been charged to the Estate as reflected by credits in its list of expenses.

STB has once again sought reimbursement for expense items described as "Word Processing," "Proofreading," "Desktop Publishing," "Overtime Transportation," "Overtime Meals and Carfare," "Restaurant/STB Cafeteria," and "Conference Meals". These expenses, totaling \$54,323.28, shall be disallowed consistent with the Court's ruling in prior decisions.

The Court notes that STB, in accordance with the Court's prior admonitions, has reduced its charges for "Express Mail/Messenger/Courier Service" to \$14,653.19, as compared to \$26,734.87 in the prior application. Accordingly, the Court will make no disallowance in this category for this particular Fee Application with the hope that STB will continue to reduce its expenses in this category.

In summary, the Court makes the following reductions to fees and expenses sought in the Fifth Application:

<u>Total Requested Fees</u> (as adjusted)	\$ 3,044,481.50
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Disallowances:

Long Billing Days	- 43,278.00
Vague Documentation of Services	- 674.50
Intra Office Conferences and Multiple Attendance at Events	- 12,454.00
Administrative and Clerical Tasks	- 80,101.00
Fee Application	- 41,701.27
Retention of Local Counsel	- 16,448.00
Lady Kathleen	- 4,228.00
Change of Venue Motion	- 6,249.15
Database Services	- 4,909.50
§ 341 Meetings	- 6,630.00
Miscellaneous	- 2,629.50
Provisional Fee Award granted on May 21, 1998,	- 1,000,0/0.00

<u>Net Total Fee Allowed</u>	\$ 1,825,178.70
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<u>Total Requested Expenses</u> (as adjusted)	\$ 430,466.25
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Office Overhead	- 54,323.28
Provisional Expense Award granted on	

May 21, 1998

- 200,000.00

Net Total Expenses Allowed

\$ 176,142.97

Based on the foregoing, it is

ORDERED that the fees and expenses requested by STB in its Fifth Application shall be disallowed as detailed above; and it is further

ORDERED that payment of the remaining balance of allowed fees and expenses, and any amount still due and owing on any prior award, shall not be made from encumbered assets of the consolidated Estate.

Dated at Utica, New York

this 16th day of November 1998

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge